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No. 99-699

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE, THE INDIVIDUAL RIGHTS FOUNDATION, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America ("Petitioners" or "Boy Scouts") and Respondent James Dale ("Respondent" or "Dale") have each consented to the filing of this amicus curiae brief [1] by the Individual Rights Foundation ("IRF").

The IRF was founded in 1993 and is dedicated to educating the public about the importance of the First

[1] Counsel of record, Paul A. Hoffman, authored this amicus curiae brief in its entirety. No person or entity, outside of amicus curiae, The Individual Rights Foundation, its members or its counsel of record, has made a monetary contribution to the preparation or submission of the present amicus curiae brief. The written consents of Petitioners and Respondent have been filed with the Clerk of the Court.

Amendment's free speech and associational guarantees. To further its educational goals, the IRF conducts seminars and other public events, publishes newsletters, and files amicus curiae briefs in appellate cases involving First Amendment speech and associational rights issues. The IRF seeks to resist attempts from anywhere along the political spectrum to limit public expression because such attempts pose a serious threat both to cultural diversity and to our free form of government.

STATEMENT OF THE CASE

This amicus adopts the Statement of the Case set forth in the Petition for a Writ of Certiorari ("Petition") by Boy Scouts.[2] Nonetheless, the IRF wishes to highlight a few points in the record below.

The Record Below

It is important at the outset to focus on what is not contained in the record below. There is no evidence that Boy Scouts bar anyone based on mere status, unannounced and unbroadcasted, as homosexuals. The record below reveals that Boy Scouts are not interested in the *private* sexual status of any of their adult leaders, but only in their *public* expressions regarding sexuality, which may affect their ability to effectively teach or role model *Scouting's* beliefs regarding traditional morality. This is shown by Dale's own admission that he is "aware of other homosexuals active in Scouting against whom no adverse action has been taken because they have not 'gone public' with their sexual orientation." (160a.) This is consistent with Boy Scouts' position that "Boy Scouting makes no

[2] Numbers preceded by "A." refer to pages in the record before the New Jersey Supreme Court; numbers preceded by "P." refer to the Petition for a Writ of Certiorari; numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition.

effort to investigate the sexual orientation of members or leaders." (P.4 n.2) Nor is there any evidence in the record below that Boy Scouts ever asked Dale or any other applicant about his or her private sexual life.

What the record below does show is that Boy Scouts' membership policies are concerned with *public expression*. Boy Scouts' policy excludes only "avowed homosexuals." (A.1957.) Boy Scouts were interested in Dale's *public* statements and conduct only because of the obvious impact such behavior would have on his ability to serve as a role model for Scouting's preferred values. (207a; 223a.)

Citing an extensive review of material, the Superior Court of New Jersey, Chancery Division ("Chancery Division"), expressly found that "from its inception Scouting has excluded from membership and adult leadership any person *who openly declares* himself a homosexual and that such policy has continued unchanged, to the present . . . . It is the firm position of BSA that [homosexual] conduct is not 'morally straight' under the Scout Oath nor is it 'clean' under the Scout Law." (192a) (emphasis added).

There is no evidence in the record that anyone in Boy Scouts knew of Dale's homosexuality, or would likely ever have known, but for Dale's extraordinary efforts to *publicly broadcast* his views as a homosexual advocate to a reporter for *The Newark Star-Ledger*, who identified Dale as Co-President of the Rutgers University Lesbian/Gay Alliance. (A.1946.) Boy Scouts became aware of Dale's homosexuality solely as a result of his voluntary newspaper interview. (A.3576.) Thus, had Dale not taken efforts to *publicize* his views as a homosexual, his

membership in Boy Scouts would not have been revoked. Based thereon, the Chancery Division ruled that Boy Scouts could revoke his membership.

Ruling of Appellate Courts Below

The Superior Court of New Jersey, Appellate Division, reversed in a split decision (Landau, J., dissenting), concluding, among other things, that: (1) Boy Scouts of America is a place of public accommodation within the meaning of the New Jersey Law Against Discrimination ("LAD") (124a); (2) enforcement of the LAD is unrelated to the suppression of ideas because it will not significantly affect Boy Scouts' ability to carry out expressive purposes (136a); and (3) Boy Scouts failed to show that the policy of excluding avowed homosexuals was a collective viewpoint that brought members together. (143a-144a.)

The New Jersey Supreme Court ("NJSC") affirmed, by ruling, among other things, as follows:

> We find that the LAD does not violate Boy Scouts freedom of expressive association because the statute *does not have a significant impact on* Boy Scout members' ability to associate with one another in *pursuit of shared views.* The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scouts *members do not associate for the purpose of disseminating the belief that homosexuality is immoral*; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and *Boys Scouts include sponsors and members who subscribe to different views in respect of homosexuality.*

Dale v. Boy Scouts of America, 160 N.J. 562, 612, 734 A.2d 1196 (1999) (emphasis added).

SUMMARY OF ARGUMENT

Your amicus respectfully submits that several constitutional errors by the NJSC demand this Court's review in order to avoid serious erosion of the freedoms of speech and expressive association:

(1) The NJSC's decision below erroneously concluded that discrimination based on self-identifying *speech* is the same as discrimination based on status. However, under this Court's First Amendment jurisprudence, the fact that homosexual "coming out" speech is "self-identifying speech" does not grant the State of New Jersey a greater right to regulate the content of private speech or diminish the right of expressive associations to exclude those whose self-identifying speech is contrary to their expressive purposes.

(2) Scout leader role modeling constitutes symbolic speech and expressive conduct under *Texas v. Johnson*, 491 U.S. 397 (1989) because the record below shows that Boy Scouting intends to and does effectively convey specific messages and values (i.e., the principles embodied in the Boy Scout Oath and Law) by means of role modeling. Boy Scouts' role modeling is founded on the belief that a Scout leader's example is more effective than the spoken word in transmitting moral values to young Scouts. Therefore, requiring the appointment of someone whose public example runs counter to the organization's values alters both the form and content of Boy Scouts' intended speech and constitutes state suppression of free expression.

(3) The NJSC mistakenly held that only those messages in which an expressive association shares a "single view" which functions as "a unifying associational goal of the organization" can justify exclusion of those representing contrary viewpoints. Limiting the right of expressive

association to only those few viewpoints that bring the entire membership together would not only eviscerate this Court's opinion in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), but would all but destroy the right of expressive association for large associations, including political parties, which cannot meet this test.

ARGUMENT

I. STATE-MANDATED ACCEPTANCE OF SELF-IDENTIFYING HOMOSEXUALS AS ROLE MODELS OF BOY SCOUTS' VALUES IMPERMISSIBLY REQUIRES BOY SCOUTS TO ACCEPT SPEECH WHICH IS CONTRARY TO THE VALUES THEY WISH TO CONVEY

The NJSC's opinion attempts to distinguish the facts presented in this case from this Court's ruling in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), by stating that "Dale's status as a scout leader is not equivalent to a group marching in a parade" and that Boy Scout leadership is not a "form of 'pure speech' akin to a parade." *Dale, supra*, 160 N.J. at 623. However, the applicability of the speech principles announced in *Hurley* cannot be so easily dismissed.[3] As shown below, this Court should

[3] The NJSC's opinion tries to distinguish *Hurley* because "Dale does not come to Boy Scout meetings 'carrying a banner.'" *Dale, supra*, 160 N.J. at 623. The NJSC's cramped reading of *Hurley leads to a strange anomaly:* Only if Boy Scouts obtain a permit and march in a *parade* may they lawfully exclude leaders, like Dale, who may want to wear a sign in such a parade stating "I am a gay Scoutmaster," but Boy Scouts may not lawfully exclude those same individuals at any other Scouting event, such as a Scout-O-Rama, a Boy Scout Jamboree, or a Scout meeting, who may stand and announce that "I am a gay Scoutmaster." This example illustrates how the speech principles announced in *Hurley* are broad and cannot be limited to just one narrow category of speech (i.e., parades).

grant the Petition in this case because serious issues regarding the applicability of *Hurley* are clearly raised.

Since homosexuality is generally a latent characteristic, unlike race and gender,[4] homosexuals who wish to openly proclaim their homosexuality must, by definition, *send a message to* others. Such a message constitutes speech and is inherently expressive. *See, e.g.*, Nan D. Hunter, et al., *The Rights of Lesbians and Gay Men: The Basic ACLU Guide to a Gay Person's Rights* 9 (3d ed. 1992) ("*coming out speech ought to be recognized by the courts as political expression*") (emphasis added); David Cole & William N. Eskridge, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L.Rev. 319, 325 (1993) ("An *admission of sexual identity is expressive* in the strictest sense of the word.") (emphasis added); Jose Gomez, *The Public Expression of Lesbian/Gay Personhood As Protected Speech*, 1 Law & Ineq. J. 121 (1983).[5] One of the messages of such speech is that the homosexual lifestyle is acceptable. Comment, *Expression By Associa-*

[4] "Homosexuality is . . . behavioral and hence is fundamentally different from traits such as race, gender, or alienage . . . ." *High Tech Gays v. Defense Ind. Sec. Clearance Office*, 895 F.2d 563, 573 (CA9 1990). *See also* William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the 'Hate-Speech' Debate from a Lesbian/Gay Perspective*, in *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, And Civil Liberties* 283 (1994) ("sexual orientation is not, like race or gender, visually identifiable: individuals must take on a lesbian/gay identity through some speech or speech act known as 'coming out'").

[5] One of Dale's attorneys, Evan Wolfson, admits that there are "inherently political dimensions to being *openly* gay or lesbian." (Evan Wolfson & Robert S. Mower, *When the Police Are In Our Bedrooms, Shouldn't The Courts Go In After Them?: An Update On The Fight Against "Sodomy" Laws*, 21 Fordham Urb. L.J. 997, 1025 n.100 (1994) (emphasis added).)

tion: Towards Defining An Expressive Association Defense In Unruh-Based Sexual Orientation Discrimination Actions, 33 Santa Clara L. Rev. 467, 510 (1993) ("it seems that an individual's decision to publicly express his or her sexuality *is a personal affirmation that such conduct is legitimate or acceptable*") (emphasis added).

The issue of whether a direct burden would be placed on Boy Scouts' First Amendment rights by forcing them to accept Dale's speech, not just his status, is most clearly raised in *Hurley*. The parade organizers in *Hurley* represented that they reflected "traditional religious and social values" and wished to exclude "groups with sexual themes." *Hurley*, 515 U.S. at 562. Although participation by the Irish-American Gay, Lesbian & Bisexual Group of Boston ("GLIB") was also expressive in character, *id.* at 570, the only *public* message manifested at the parade by GLIB was its own *self-identifying speech*, when it "marched behind a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.'" *Id.* Based on these facts, this Court concluded that GLIB had sought to "communicate its ideas as part of the existing parade." *Id.* This alone was enough to find an implied message that conflicted with the wishes of the parade organizers. The same conflict is inherent in the present case.

Openly gay persons who apply to be Scoutmasters when they know that Boy Scouts take a position against alternative sexual lifestyles [6] are, in essence, *requesting that Boy Scouts accept their political message or speech,* not just their sexual orientation status. When public

[6] For example, it is hardly disputable that Boy Scouts have the right to reject other messages or speakers who seek to use Scouting as a vehicle to "legitimize" other sexual lifestyles, such as prostitution, polygamy, adultery or unmarried heterosexual cohabitation.

accommodation statutes, however well intentioned, are used to require acceptance, the state is clearly compelling acceptance of private political speech, directly contrary to this Court's holding in *Hurley*. As stated by Judge Landau in his dissent below in the Superior Court, Appellate Division: "This principle is not changed merely because the altered message is implicitly, but no less strongly, conveyed by example rather than by verbal articulation or by signs." (153a.) Accordingly, the present Petition plainly raises the issue of whether the rule of "speaker's autonomy" established by this Court in *Hurley* is being threatened by misapplication of state public accommodation laws.

Moreover, the constitutional conflict raised by the Petition is not laid to rest by the counter-argument that, since homosexuals are known almost exclusively by their self-identifying speech, or because homosexual status cannot be separated from homosexual speech, therefore, a homosexual person cannot be excluded based on his or her "coming out" speech. *See, e.g., Dale, supra,* 160 N.J. at 641 (concurring opinion of Justice Handler).[7] This argument only begs the very question at issue in this case: whether self-identifying *speech* is interfering with Boy Scouts' rights of speech and expressive association.

Speech is speech, whether it is self-identifying speech or some other type of speech. Accordingly, if homosexual status really cannot be separated from homosexual self-identifying speech, then forcing expressive associations opposed to the homosexual lifestyle to accept openly

[7] This counter-argument clearly fails if carried to its logical conclusion. For example, most Catholics also cannot be identified other than by their self-identifying speech. However, this fact does not give them a right to join a Protestant or Jewish fraternal organization.

homosexual persons is also, *a priori,* forcing them to accept such persons' speech. Unless this Court is willing to carve out a new exception to First Amendment jurisprudence for self-identifying speech, it seems self-evident that homosexuals do not have a special right above other Americans to compel private expressive associations to accept their speech.

By the same token, if homosexual status truly cannot be separated from homosexual speech, then an expressive association's rejection of an openly homosexual person is not necessarily based on a rejection of such person's status. It may be legitimately based on rejection of the message of such person's "coming out" speech. Accordingly, one of the basic assumptions on which rests much of the reasoning of the NJSC's ruling, that Boy Scouts revoked Dale's membership "solely because of his status as a homosexual" (160 N.J. at 624), is very doubtful. Therefore, the Petition squarely raises the serious constitutional issue of whether Boy Scouts' rejection of openly homosexual persons like Dale is not necessarily an act of prohibited discrimination based on status but is logically related to exclusion of adverse ideological speech which would inherently subvert the expressive association.

II. BOY SCOUTS' UNIQUE EMPHASIS ON TEACHING BY EXAMPLE AND BY ROLE MODELING IS ITSELF A FORM OF SPEECH OR EXPRESSIVE CONDUCT PROTECTED BY THE FIRST AMENDMENT

In addition to raising the issue of whether Boy Scouts should be required to accept someone else's speech, the Petition raises a second but equally important issue: whether the NJSC's ruling alters or limits Boy Scouts' own affirmative speech communicated through the medium of role modeling.

In *Hurley, supra,* this Court stated that "the Constitution looks beyond written or spoken words as mediums of expression." 515 U.S. at 569. For example, parading is expressive because it is not simply movement from one place to another but is a form of "making some sort of collective point, not just to each other but to bystanders along the way." *Id.* at 568.

Because expressive *conduct,* and not just words, convey a message which constitutes speech, the First Amendment protects expressive associations which limit the content of their speech by their choice of role models. Common examples of such expressive activity include appointment of church ministers and youth counselors, who often teach more *by their example* than by their preaching.

In *Texas v. Johnson,* 491 U.S. 397, 403-405 (1989), this Court reiterated its two-part test for determining whether a state regulation, as applied to conduct alleged to be expressive, violates the First Amendment: (1) whether the conduct itself is expressive, as shown by an intent to convey a particularized message which is likely to be understood by those viewing it, and (2) if so, whether the state's interest in regulating such conduct is "related to the suppression of free expression."

With respect to the first prong of *Texas v. Johnson,* the record below reveals a strong case for finding expressive conduct because there can be little doubt that *Boy Scouting intends to convey a particularized message (i.e., the principles embodied in the Boy Scout Oath and Law) through its choice of role models* and that " 'the likelihood was great that the message would be understood by those who viewed it.' " *Id.* at 404 (citing *Spence v. Washington,* 418 U.S. 405, 410-411 (1974)). The communicative intent of Boy Scouts is clearly stated in their Mission Statement: "It is the mission of Boy Scouts . . . *to instill*

values in young people . . . . The values we strive *to instill* are based on those found in the Scout Oath and Law." (A.2238) (emphasis added).

Boy Scouts control the messages and values instilled in young Scouts, in part, by excluding individuals who would *express views or model behavior contrary to Scouting's views.* The Chancery Division below expressly found that "*Scoutmasters are* teachers and *role models* of 'what a man should be like' *in all aspects* of male adulthood." (207a) (emphasis added). It further found that "[t]o be an adult leader of Scouting one must agree to be bound not only by the Scout Oath or Promise but also by the Declaration of Religious Principles." (206a.) Such a leader "must possess the moral, educational, and emotional qualities deemed necessary by BSA for leadership before he will be commissioned." (222a.) The Chancery Division concluded that requiring Dale to be admitted as a Scout leader "would be devastating to the essential nature of scouting" partly because a role model's example is "critical" to Scouting's mission of conveying the values of the Scout Oath and Law. (223a.) These facts clearly show that there is an *intent* by Boy Scouts to communicate a *specific message* through role modeling.

The record below also shows a great likelihood that those viewing the conduct would understand the message. Boy Scout literature is replete with statements that boys best *understand* the message of Scouting through role modeling. The Official Scoutmaster Handbook, which Dale had when he registered as a Scout leader, stated:

> In his quest for manhood, every boy needs contact with men *he can copy*. Living, breathing men provide *models* of what manhood is like. *Boys copy whatever models are available to them* . . . . You are providing a good *example* of what a man should be like. What you do and *what you are* may be worth a thousand lectures and sermons.

(A.3200) (emphasis added). The Handbook further stated: "*What you are* speaks louder than what you say." (A.3201) (emphasis added). The Scoutmaster Handbook also advises Scout leaders: "When you're on a Scout camp out, remember that *boys will look up to you as a role model—someone they want to* respect and *copy*." (A.2685) (emphasis added). "Boys learn from the *example* set by their adult leaders." (A.2652) (emphasis added).

Recognizing the power of example on young Scouts, Dale himself admitted that it was his responsibility "to set an example of living by the Scout oath and law . . . ." (A.3333.) He also admitted that, in order to effectively instill Scouting values in youth, it is important for a Scout leader "*never to do or say anything inconsistent* with the values embodied in the Scout Oath or the Scout Law." (A.1914) (emphasis added).

Evidence in the record indicated the drastic effect that admission of known or avowed homosexuals would have on the communicative aspects of role modeling and on young Scouts' *understanding* of what it means to be morally straight and clean. (A.3226-A.3232.) Professor Slavings described the various mechanisms by which adult leaders' role modeling contributes to value transmission and showed how each method would be weakened and disrupted if someone like Dale were placed in the position of adult leader. (*Id.*) These facts show that young Scouts *understand* the messages of role models.

Since the record below shows that Boy Scouts' role modeling is clearly expressive in character, the second prong of *Texas v. Johnson* requires a determination

"whether the State's regulation is related to the suppression of free expression." 491 U.S. at 403. If the state's interest is related to suppression of ideas, then strict scrutiny is the standard of review. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Even a regulation which is intended to vindicate a compelling state interest must be shown to be "unrelated to the suppression of free expression" and "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Id.*

The NJSC's ruling results in the suppression of expression because Dale's forced admission to Boy Scouts would alter both the form and content of Boy Scouts' expressive role modeling. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), this Court stated that "[m]andating speech that a speaker would not otherwise make *necessarily alters the content* of the speech." 487 U.S. at 795 (emphasis added). Instead, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say *and how to say it* . . . . To this end, the government, even with the purest of motives, may not substitute its judgment as to *how* best to speak . . . ." *Id.* at 790-791 (emphasis added). Moreover, "[g]overnmental restraint on [speech] need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

In *Texas v. Johnson*, this Court, while recognizing the special place of the flag in our tradition and history, expressly declined to create an exception under the First Amendment that would allow the government to restrict expressive conduct to orthodox viewpoints. 491 U.S. at 418. The Court also suggested that "other concepts virtually sacred to our Nation as a whole," such as the state's interest in preventing discrimination, may be questioned "in the marketplace of ideas" and cannot be used to override the supremacy of the First Amendment. *Id.*

This case raises serious issues of state-mandated censorship precisely because of the controversial nature of Boy Scouts' definition of what is "morally straight." "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414. "[T]hat the government may not prohibit expression simply because it disagrees with its message, is *not dependent on the particular mode in which one chooses to express an idea.*" *Id.* at 416 (emphasis added). Accordingly, the government may not "ensure that a symbol be used to express only one view of that symbol or its referents." *Id.* at 417.

The role of Scoutmaster is clearly symbolic in large measure. Hence, to deny the symbolic nature of Boy Scouts' role modeling arguably limits the number of messages that can be conveyed through Scoutmaster role modeling and amounts to a limitation on speech. "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries." *Id.*

The present Petition clearly raises the issue that Boy Scouts seek to control the messages they send to youth and the public through their unique emphasis on role modeling. Choosing a role model in such a context is just as vital to Boy Scouts' expressive purposes as choosing their speakers or their speech at a Court of Honor. Thus, when the state seeks, as in this case, to dictate who may occupy role modeling positions, there is a great

danger that it may be substantially altering both the *form* and the *content* of such expression.

It is precisely in the area of governmental regulation of expressive conduct through public accommodation statutes that the danger of ideological constraint is high, especially if the nexus between the expressive nature of the activity and the interest being regulated is not well understood. Since Boy Scouts seek to teach their messages and values *by quiet role modeling* and not by boisterous debate, there is a great danger that outsiders (including the state) may interpret such a position as no position at all, as the NJSC has done in this case. However, this does not mean that such quiet advocacy is not worthy of protection under the First Amendment.

The danger of state-mandated orthodoxy is especially high in this case because there remains a strong likelihood that requiring admission of openly gay Scoutmasters will confuse both the Scouts and the community as to what message Boy Scouts are really sending. For example, even if openly gay persons promised to teach only Boy Scouts' viewpoint on sexual morality, their contradictory example *could lead to a logical conclusion in the minds of young Scouts* and other observers of *"do as I say, not as I do."* Such a message would completely undermine the pedagogical value of role modeling as well as destroy the moral teaching against homosexual conduct. Therefore, the state's attempt to dictate appropriate role models in this case is little different than, for instance, a state regulation requiring non-celibates to be admitted as Catholic priests. Accordingly, there is a great likelihood that the NJSC's ruling, if left intact, will be disruptive of core First Amendment expression.

III. THE FACT THAT BOY SCOUTS' MEMBERS' OR SPONSORS' VIEWS MAY NOT BE UNANIMOUS DOES NOT DIMINISH BOY SCOUTS' RIGHT TO EXCLUDE CONTRARY ROLE MODELS BECAUSE THE RIGHT OF SPEAKER'S AUTONOMY IS NOT LIMITED TO CONSISTENT, DISTINCT OR ARTICULATE MESSAGES

The NJSC's decision below also demands review because it denigrates the principle established in *Hurley* that the right of speaker's autonomy is not limited to consistent, distinct or articulate messages. The NJSC appears to have mistakenly assumed that all or most members of Boy Scouts must have as a "shared goal" the "view that homosexuality is immoral" in order for that viewpoint to achieve any constitutional protection. *Dale, supra,* 160 N.J. at 613. The NJSC concluded that "Boy Scouts' religious sponsors differ in their views about homosexuality" and, therefore, "it appears that *no single view on this subject functions as a unifying associational goal* of the organization." *Id.* at 615 (emphasis added). The NJSC's limited view of the rights of speech and expressive association in this regard were clearly rejected in *Hurley*.

Notwithstanding the fact that the *Hurley* parade had "multifarious" and "conflicting" voices, this Court ruled that it was, nevertheless, still an expressive association entitled to First Amendment protection. *Hurley,* 515 U.S. at 562, 569. Unlike Boy Scouts, the parade organizers "had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had occasionally admitted groups who simply showed up at the parade without having submitted an application, and did 'not generally inquire into the specific messages or views of each applicant.'" *Id.* at 562 (citations omitted). These facts did not diminish their First Amendment right to exclude from the parade individuals

bearing an undesirable message. Since the record in this case discloses that Boy Scouts are much more selective and have a clearer sense of expressive purposes, the protection from government interference arguably should be greater here.

Furthermore, there are important policy reasons why the right of expressive association should not be limited to viewpoints in which the members of an association agree. As a practical matter, such a limitation would so limit the right of expressive association as to make it meaningless to any large organization. There are many large private groups in this country which lack "genuine selectivity" and contain many members whose "messages" contradict each other.[8] For example, only two generations ago, the Democratic Party had some members who wanted to enact extensive civil rights legislation (such as Senators Hubert Humphrey and Paul Douglas) and other members who believed with equal fervor in segregation (such as Senator Richard Russell). The Democratic Party also did not have (and still does not have) a consistent way of selecting its members. Merely because the Democratic Party members who believed in segregation as well as those who wanted extensive civil rights laws enacted does

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[8] For example, the American Bible Society, American Mizrachi Women, Inc., Baptist World Alliance, Catholic Relief Services, Christian Records Services, Inc., Ecumenical Association For Housing, Episcopal Community Services, Girl Scouts of the U.S.A., Graduate Theological Union, Jewish Community Centers Association of North America, The Jerusalem Fund of Aish HaTorah, Jewish Vocational and Career Counseling Service, Lutheran World Relief, Inc., Masonic Lodges, The Salvation Army, The Society For The Propagation Of The Faith, Union of American Hebrew Congregations, Union Rescue Mission, and Young Women's Christian Association. *See The Guide to Gifts and Bequests, 1995-1997: A Directory of Philanthropically Supported Institutions* (1995) at 23-239.

not mean that the First Amendment right of expressive association does not apply to the Democratic Party and its chosen platform. This Court in *Hurley* clearly rejected the view limiting expressive association rights to small homogeneous groups with narrow viewpoints or rigid rules of selection. Thus, the NJSC's decision below deserves review because it directly conflicts with this Court's opinion in *Hurley* regarding the applicability of expressive association rights to large and diverse private associations.

CONCLUSION

This amicus respectfully submits that this Court should overturn efforts from any part of the political spectrum to compel ideological orthodoxy, especially when it is directed against expressive associations. Far from vindicating the rights of homosexuals, a ruling which undermines the right of expressive association in this case may lay the groundwork for denial of First Amendment rights of all citizens, including First Amendment rights of homosexuals.

Granting certiorari in this case and reversing the ruling below will not lead to a general undermining of legal protection for gays and lesbians. Hotels, restaurants, and other commercial establishments rarely, if ever, exist for an expressive purpose. Unlike Boy Scouts, the purpose of most commercial establishments is to make a profit, not a moral point. It simply strains credibility to suggest that most, or even many, businesses exist to teach their customers, clients, or membership the virtues of traditional fatherhood and family values. Therefore, their conduct can be constitutionally regulated in conformity with the civil rights laws.

However, by refusing to grant the Petition in this case, the freedom of all private expressive associations to speak and associate for the promotion of their expressive pur-

poses will be substantially chilled. Therefore, your amicus respectfully urges this Court to grant the Petition in this case in order to avoid erosion of important First Amendment rights of all expressive associations.

Respectfully submitted,

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